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No. 77-1064

In the Supreme Court of the United States

OCTOBER TERM, 1977

PHILIP A. MCLENNAN AND FRED H. BENDER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 40-90) is reported at 563 F. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1977. A petition for rehearing was denied on December 2, 1977. The petition for a writ of certiorari was filed on December 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether testimony of petitioners' former counsel concerning a prior statement to his clients was inadmissible hearsay.

2. Whether the district court erred in its instruction to the jury concerning the dismissal of part of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the District of Oregon, petitioners were convicted on two counts of making knowingly false statements in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. 1001, four counts of making knowingly false statements for the purpose of influencing the action of the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. 1010, and one count of conspiring to make such false statements and to defraud the United States, in violation of 18 U.S.C. 371. Each petitioner was sentenced to three years' imprisonment and fined $40,000. Petitioners were also placed on probation for a period of five years, to commence after their release from custody. The conditions of probation included the payment of an additional $10,000 fine and the contribution of 400 hours in community service work under the direction of a probation officer. A divided panel of the court of appeals affirmed (Pet. App.).

The evidence at trial established that from 1971 through 1975, petitioners, through two non-profit corporations, applied to HUD for loans under the College Housing Act of 1950, 64 Stat. 77, as amended, 12 U.S.C. 1749 *et seq.*, for the purpose of designing and constructing seven college dormitory facilities in four states (Gov. Exhs. 5-11). Under the Act, HUD loans funds to eligible applicants in sufficient amount to cover all necessary costs of construction. However, only those costs actually incurred by a borrower and agreed to by HUD are eligible costs (Tr. 73), and any profit-making by a borrower is prohibited (Tr. 62-63).

Of the loan proceeds they received from HUD between October 1971 and April 1975, petitioners represented that $961,282 was paid or payable for architectural services rendered by Charles R. Dahlen. Petitioners made such representations in their loan applications, owner-architect agreements, conversations with HUD employees, fund requisitions, and final project cost certifications (Gov. Exhs. 5-11; Tr. 567).

In fact, however, petitioners diverted some $600,000 of this money to their personal use. Dahlen functioned not as an independent contractor, as HUD was led to believe, but rather as a salaried employee of petitioners (Tr. 208, 217; Gov. Exh. 71). Petitioners paid Dahlen's salary and expenses with approximately $300,000 of the HUD funds earmarked for architectural services. They then divided the remaining portion of the architectural funds between themselves (Tr. 151-152, 592-594; Gov. Exhs. 38, 117, 118, 120).

Petitioners' primary defense was that they had acted in good faith in reliance on the advice of their attorney and accountants. At trial, petitioners waived the attorney-client privilege to allow their attorney to testify.

Before submitting the case to the jury, the district court dismissed that portion of the conspiracy count that charged petitioners with agreeing to violate the Copeland Act, 18 U.S.C. 874. That provision states:

> Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up

any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Defense counsel argued that this provision applies only to "kickbacks" from employees on the payroll of a government contractor or sub-contractor, and not to the owner-architect agreement at issue here. The district court apparently agreed. Accordingly, the court told the jury that it had "taken certain portions of the indictment away from the jury's consideration * * * purely as a matter of law," and that this action "ha[d] nothing to do with the factual determination which [the jury was] to make on the other counts" (Tr. 937-938). Defense counsel raised no objection to this instruction and did not ask that the court tell the jury anything further.

ARGUMENT

1. Petitioners contend (Pet. 3-4) that certain testimony given by their former counsel, Donald Burnett, was inadmissible hearsay. The challenged statement was elicited during the prosecution's direct examination of Burnett. Questions concerning the extent of Burnett's knowledge of his clients' activities led to the following exchange (Tr. 407, 409):

Q. Now, were you aware, in 1971, that funds were being paid from an account in the name of Charles Dahlen to Mr. Bender and Mr. McLennan?

A. No.

Q. Were you aware of that in 1972?

A. No.

Q. Did you become aware of that in 1973?

A. In late 1973, yes.

* * * * *

Q. When you did learn from Mr. Bender about these transfers, do you specifically recall what it was that you said to him?

A. Yes.

Q. And what was it?

A. "For Christ's sake, I told you that was illegal."

Petitioners object to Burnett's last answer. But, as the trial court ruled, this statement was not hearsay, because it was not offered to prove the truth of the matter asserted (Fed. R. Evid. 801(c)). Petitioners' defense was that they lacked the requisite criminal intent because they had acted in good faith in reliance upon the advice of counsel. Burnett's statement was admitted to rebut that defense. The statement was not offered to prove the truth of what Burnett said—that petitioners' actions were illegal or that, in some conversation prior to the one about which he was testifying, Burnett had told petitioners that their conduct was illegal. Rather, the statement was introduced to show the state of Burnett's knowledge in late 1973, *i.e.*, to show that at that time Burnett was completely unaware of exactly how his clients had been handling the HUD funds. Reliance upon the advice of counsel is no defense unless counsel has specifically recommended the course of conduct actually taken, and has done so after defendants have fully apprised him of the relevant facts. See, *e.g.*, *United States* v. *King*, 560 F. 2d 122, 132 (C.A. 2); *Bisno* v. *United States*, 299 F. 2d 711, 719-720 (C.A. 9), certiorari denied, 370 U.S. 952.

The disputed testimony was also relevant to show that, at least after Burnett's statement was made, in late 1973, petitioners knew that any further transfers from the architectural fees account to their own accounts would be

directly contrary to the advice of their lawyer.[1] Again under this rationale, the statement was not offered to prove the truth of what was said. Rather, it was submitted because the fact of its utterance was probative of what defendants knew and when they knew it. *United States* v. *Kutas,* 542 F. 2d 527, 528 (C.A. 9), certiorari denied, 429 U.S. 1073. The jury could infer criminal intent from the fact that petitioners continued to appropriate the architectural fees for themselves despite Burnett's remark.

2. a. Petitioners also contend (Pet. 31-39) that the district court erred in not explaining to the jury the substance of the portion of the conspiracy count that was dismissed. Petitioners' counsel never requested such an explanation. Nonetheless, petitioners now argue that this failure resulted in instructions that confused the jury and left it uncertain of the grounds upon which it could convict. This is not so. When the court instructed the jury, it described only the elements of the remaining offenses charged. None of the instructions pertained to the Copeland Act or to an alleged agreement to violate that Act. All references to the dismissed charge were deleted from the copy of the indictment that was given to the jury.

Petitioners do not claim that any of the instructions actually given were inaccurate. This case is therefore distinguishable from *Bollenbach* v. *United States,* 326 U.S. 607, on which petitioners rely. There, the trial judge gave a "palpably erroneous answer" to the jury's request for guidance on a particular point of law. This Court reversed the ensuing conviction, because it was unwilling

[1]Two counts in the indictment related to false certifications made after Burnett's statement about illegality.

to believe that the jury had disregarded the incorrect instruction.[2] Here, by contrast, the instructions were entirely proper, and the district court was not obliged to provide additional information about the dismissed charge.

b. Petitioners cite (Pet. 36) several cases in which appellate courts have found that defendants suffered prejudice because the jury was improperly influenced by evidence relating solely to charges later dismissed. See *United States* v. *Dreyfus,* 528 F. 2d 1064 (C.A. 5); *United States* v. *Wolfson,* 437 F. 2d 862 (C.A. 2); *United States* v. *Jackson,* 418 F. 2d 786 (C.A. 6). In each of these cases, however, the jury heard substantial damaging evidence, central to the government's case, all of which was rendered irrelevant by the subsequent dismissal of the charge involved. Here, petitioners do not claim that any irrelevant evidence was admitted, and, indeed, all the evidence presented at trial did relate to the charges actually submitted to the jury. There was thus no need to caution the jurors to disregard evidence relevant only to an alleged agreement to violate the Copeland Act.

Moreover, as Judge Duniway's opinion in the court of appeals correctly observes, the Copeland Act portion of the conspiracy count was a minor part of the government's case (Pet. App. 66-68). The thrust of the charges against petitioners was that they had devised a sophisticated fraud against the government, pursuant to which they kept for themselves federal funds obtained on

[2]The Court's reluctance to make this assumption is thoroughly understandable in light of the facts in *Bollenbach.* The jury in that case deliberated for seven hours and then sought further assistance from the court. After hearing the trial judge's wrong answer to the question posed, the jury resumed its deliberations and returned a guilty verdict in five minutes.

the representation that they would be used to pay for an architect's services. The government's evidence was only peripherally directed toward proving that petitioners had agreed to induce architect Dahlen to surrender part of the compensation to which he was entitled under his contract of employment, in violation of the Copeland Act.

c. After the district court informed the jury that an unspecified portion of the conspiracy count had been dismissed as a matter of law, the prosecutor mentioned the Copeland Act on one occasion during closing argument (Tr. 969-974). He did so in an attempt to explain the segment of Burnett's testimony reproduced above (see pp. 4-5, *supra*). In late 1973, when Burnett told petitioners that what they were doing was illegal, he apparently thought that their behavior violated the Copeland Act. The prosecutor therefore referred to the Act for the purpose of clarifying Burnett's statement. Petitioners did not object. At no time did the prosecutor argue that petitioners had in fact committed a Copeland Act offense.

Judge Ely, dissenting in the court of appeals, concluded that the Assistant United States Attorney's single comment concerning the Act could have led the jury to believe that it was still required to decide whether petitioner had conspired to violate that statute (Pet. App. 85-89). Petitioners now assert error on this basis (Pet. 33 n. 13). But if petitioners feared that either Burnett's testimony or the prosecutor's remark might have been understood as an assertion that petitioners had violated the Copeland Act, they could have sought a limiting instruction to the effect that Burnett's statement was only relevant for what it tended to show about his knowledge of petitioners' conduct and their reliance on his advice. No such instruction was requested, and the court was not

obliged to give one *sua sponte*. See *Petley* v. *United States*, 427 F. 2d 1101, 1106 (C.A. 9), certiorari denied, 400 U.S. 827; *Sica* v. *United States*, 325 F. 2d 831, 836 (C.A. 9), certiorari denied, 376 U.S. 952.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]The first two questions presented by petitioners, namely, whether the conduct charged in the indictment violated the Copeland Act (Pet. 17-22), and whether the Double Jeopardy Clause of the Fifth Amendment bars appellate review of the dismissal of the Copeland Act portion of the conspiracy count (Pet. 23-30), are simply irrelevant to the validity of the judgment under attack. Petitioners were neither indicted nor convicted for Copeland Act offenses, and the government has not sought to appeal the dismissal of part of the conspiracy count. As Judge Duniway correctly concluded in the court of appeals (Pet. App. 70-71), the status of petitioners' behavior under the Copeland Act, and the propriety of the district court's action in removing a minor part of the indictment from the jury's consideration, have no bearing whatever on the validity of petitioners' convictions for the false statement and conspiracy offenses submitted to the jury.

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